No. 1307

Supreme Court of the United States.

OCTOBER TERM, 1946.

WABASH OIL AND GAS ASSOCIATION,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

AND

BRIEF IN SUPPORT THEREOF.

EDMUND A. WHITMAN,
Attorney for Petitioner.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Statement of the Matters Involved.

This petition presents the question whether the decision of the Circuit Court of Appeals for the First Circuit is in conflict with the decisions of the Fifth Circuit in the two cases of—

Commissioner v. *Horseshoe Lease Syndicate,* 110 Fed. (2d) 748;
Commissioner v. *Rector & Davidson,* 111 Fed. (2d) 332—

where the basic facts of a tenancy in common among the parties was substantially identical with those in the in-

stant case. In both of these cases certiorari was denied by this Court.

Commissioner v. *Horseshoe Lease Syndicate*, 311 U.S. 666.

Commissioner v. *Rector & Davidson*, 311 U.S. 672.

The facts in this case have been stipulated and are found on page 16 of the Record. They have been summarized both by the Circuit Court of Appeals and also by the Tax Court in its opinion (R. 20).

The petitioner contends that the decision in the instant case that the tenancy in common is to be taxed as a corporation is in direct conflict with the cases above referred to in the Fifth Circuit.

Jurisdiction of This Court to Review the Decree in Question.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by an Act of February 13, 1925, c. 229, 43 Stat. 938, 28 U.S.C. Sec. 347 (a). The decree which the petitioner seeks to have reviewed was entered by the Circuit Court of Appeals for the First Circuit on April 3, 1947.

Wherefore your petitioner prays that a writ of certiorari be issued under the seal of this Court, directed to the United States Circuit Court of Appeals for the First Circuit; that the judgment of the Circuit Court of Appeals be reversed and set aside and final judgment be entered for petitioner with its costs; and that your petitioner be granted such other and further relief as may be proper.

Respectfully submitted,

EDMUND A. WHITMAN,
Counsel for Petitioner.

BRIEF IN SUPPORT OF FOREGOING PETITION FOR WRIT OF CERTIORARI.

Opinions of the Courts Below.

This is a petition to review the decision of the Circuit Court of Appeals for the First Circuit, not yet reported, affirming the opinion of the Tax Court of the United States reported in 6 T.C. 542.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by an Act of February 13, 1925, c. 229, 28 U.S.C. Sec. 347 (a). The final decree of the Circuit Court of Appeals which petitioner seeks to have reviewed was entered April 3, 1947.

Statement of the Case.

Briefly stated, $19,000 was collected in varying amounts from 55 different persons for the purpose of entering into an oil venture in Grayville, Illinois, the money being paid into the hands of one Patton, a resident of Newton, Massachusetts. He and one Carey of Grayville, both contributors, negotiated an oil lease of lands in Grayville, necessary payments to secure the same being paid from the funds so collected, the title to the lease being taken in the name of Patton. Carey, a manufacturer in Grayville, employed an experienced operator to drill a well. A well was drilled and the requisite pumping machinery, tanks and delivery piping were purchased from the fund. The oil was sold to a pipe line operator through a connecting pipe

and paid for at the price posted for all oil enterprises in that district.

At the end of December, 1940, an agreement was prepared and signed by all the contributors. It provided first for a definite statement by Patton that he had acted in securing the lease as agent for all the contributors and so held it and would continue to so hold it. It appointed Patton as treasurer to have charge of the finances and Carey to supervise the operation. It also appointed one Hall to act in a purely advisory capacity, and then gave full powers of attorney to these three to act when needed. The text of the agreement is found in the opinion of the Tax Court (R. 21).

During 1941 other wells were drilled and some further equipment and supplies were purchased by Carey, money being obtained partly from a bank on promissory notes secured by assignment of the lease and a chattel mortgage on the personal property. Other money was secured by Patton on promissory notes signed by him.

The agreement further provided that in any contract or agreement entered into there should be a provision inserted that the other contracting party should look for payment to the assets and not to the individuals. This provision was never complied with by either Carey or Patton.

The remaining clauses of the agreement provided, without so specifying, for the mining law of the United States that in a mining enterprise those associated have full power to transfer their interests, but no right to terminate the business by withdrawal or assignment.

Argument.

While the opinion of the Circuit Court of Appeals mentions the cases of Horseshoe Syndicate and Rector & Davidson, set out in the petition, there was no discussion thereof.

In the Horseshoe case we quote from the opinion of the Court as follows:

> "The facts here are presented by stipulation, and, insofar as necessary to the decision, are as follows: In 1931, the several owners of a tract of land in Texas executed a mineral lease thereon to J. Edgar Finley, P. T. Fullwood, and the Patterson Drilling Company, a corporation, pursuant to an agreement between said parties, under the terms of which the lessees were required to organize a syndicate having 350 units of a par value of $100 each, to sell the units, and, from the proceeds, to drill an oil well on the property. The consideration to the lessors was a 1/8 royalty, a yearly rental of $1 per acre, and 35 units.
>
> "Finley, Fullwood, and the Patterson Drilling Company assumed the name Horseshoe Lease Syndicate, divided their joint interest in the lease into 350 fractional parts, and sold as many of said parts as they desired, delivering to the purchasers an assignment of one or more fractional parts in accordance with their purchase. Under the provisions of the assignment, the assignors contracted to drill a well with their equipment, and to operate, market, manage, and account for all proceeds thereof. Each purchaser executed in favor of the assignors a power of attorney, empowering them to act for and in behalf of all coowners in all matters relating to the property of the syndicate, thereby vesting the management and control in the three attorneys in fact. No provision was

made for the perpetuation of the management so created, or for the succession or substitution of attorneys in fact. The fractional parts purchased by assignment were readily transferable by re-assignment, and many such transfers were made. The well contracted to be drilled by the assignors was to be paid for by them, and any additional wells drilled were to be paid for out of the proceeds of the wells then producing. Excepting this stipulation, there was no other limitation of liability in favor of the assignees. The net earnings of the enterprise periodically were to be computed and divided among the co-owners as their interests appeared; no surplus was to be created, and no salaries were to be paid.

"The syndicate filed a partnership return for the year 1932, and the commissioner claimed that a corporation return should have been filed, thereby creating the issue here.

"The determination of this issue depends upon whether the syndicate, so organized and operated, resembles a corporation more nearly than it does a partnership, not being either exactly. This is a question of fact, and the Board of Tax Appeals, under the stipulated facts, found that, for purposes of the income tax laws, the syndicate more nearly resembled a partnership. This finding must be upheld by this court if there is substantial evidence to support it, even though conflicting inferences fairly might be drawn by reasonable men from the undisputed facts.

"The sole property owned by the syndicate was a mineral lease on real estate. The holdings of the various owners were not represented by shares of stock, but by undivided fractional interests in the lease; and the title to the property was in them. The owners of the lease were therefore tenants in common

of realty. The syndicate had centralized management, but it was achieved by powers of attorney executed by each holder, not by election. No continuity of existence was contemplated or provided for, although the undivided interests were readily transferable by assignment and the death of any holder would not affect the life of the syndicate. The management was vested with power to incur obligations burdening all, and there was no limitation of personal liability. No officers or directors were elected, no meetings held, no by-laws enacted, no declaration of trust made, and the unit holders had no voice in the management of the affairs of the syndicate. The management was vested with power to incur obligations burdening all, and there was no limitation of personal liability. No officers or directors were elected, no meetings held, no by-laws enacted, no declaration of trust made, and the unit holders had no voice in the management of the affairs of the syndicate.

"From the undisputed facts above stated, a reasonable inference of fact may fairly be drawn that respondent was not an association within the meaning of the statute. Therefore, there is substantial evidence to support the finding of the board to this effect, and its conclusion of law that respondent was not subject to income tax as a corporation was correct."

In the Rector & Davidson case we quote from the opinion of the Court as follows:

"The facts in this case are very similar to the facts in Commissioner of Internal Revenue v. Horseshoe Lease Syndicate, 110 F. 2d 748, decided by this court on March 26, 1940. Here, each of four individuals purchased for cash an undivided one-fourth interest

in a mineral lease on two and five-eighths acres of land in Texas. One of the four, Rector, was an experienced oil operator; another, Davidson, had some knowledge of bookkeeping; so the owners vested title to the lease in these two in order to facilitate the management and operation of the property. The name of Rector and Davidson was then assumed to identify the venture. In order to obtain money with which to develop the lease, the joint interest therein was divided into 360 fractional parts, 72 of which were sold to various individuals, and the remaining parts were divided equally among the four individual owners. Each transfer was by an assignment executed by Rector and Davidson, and each assignment designated Rector and Davidson as the agents and attorneys in fact of the assignee, authorizing them to execute all instruments, control, manage, and operate the lease, collect all proceeds thereof, pay all proper operating expenses, and distribute to the respective owners their proportionate parts of the net proceeds thereof."

The Court then discussed the case of *Morrissey* v. *Commissioner,* 296 U.S. 344, and the criteria therein laid down, and went on to say:

"In the case before us the title was held in undivided interests by all of the participants, and they were tenants in common of realty. Centralized management was obtained, not by shareholders' votes, but by the creation of an agency relation by each co-owner as principal, and without provision for continuity. There was no limitation of personal liability. No stock was issued, no meetings were held, and the enterprise had no office, no seal, no minutes, and no stock books; nor was any trust ever created. In these cir-

cumstances, the finding of the Board of Tax Appeals that respondent was a syndicate or joint venture which resembled a partnership more nearly than it did a corporation was a fair and reasonable conclusion, supported by the evidence, and its decision should be affirmed."

We submit in the instant case the contributors were and have remained tenants in common. The fact that the title to the lease was taken for convenience in the name of one contributor, and thereby technically the contributors were equitable tenants in common, should not be in itself sufficient to impose an obligation under the tax law of the United States, and the instant case is, we say, a pure tenancy in common operated by duly appointed agents.

Referring to the agreement between the co-tenants, there was nothing therein which in itself creates any other relation between them than that of co-tenants and the law should not impose upon them any other relation as a consequence of a course of conduct and dealing naturally referable to the relation already existing between them, which makes such a course of conduct to their common advantage.

The instant case was heard in the First Circuit by stipulation, and we submit that if the stipulation had provided for hearing in the Fifth Circuit, the Court would have adhered to the principle of its two prior decisions and overruled the finding of the Tax Court. The difference between the two circuits was simply in the application of the law as laid down in the Morrissey case to the facts.

It is to be noted that the clauses in the agreement relative to the termination of the enterprise and the assignability of interests added nothing to the situation, as they simply restated the mining law of the United States, which

forbids the termination of a mining enterprise by the withdrawal of one of its members or by assignment of interest.

Kahn v. *Smelting Co.*, 102 U.S. 641, at 645.

We submit, therefore, that the writ should issue as prayed for.

Respectfully submitted,

EDMUND A. WHITMAN,

Attorney for Petitioner.